

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X
4 UNITED STATES OF AMERICA, : CR-04-911
5 : (JS)
6 -against- : United States Courthouse
7 : Central Islip, New York
8 ALPHONSE PERSICO, JOHN DEROSS, : June 16, 2008
9 : 10:10 a.m.
10 Defendants. :
11 -----X

12 TRANSCRIPT OF ORAL ARGUMENT
13 BEFORE THE HONORABLE JOANNA SEYBERT
14 UNITED STATES DISTRICT COURT JUDGE

15 APPEARANCES:

16 For the Government: ROSLYNN MAUSKOPF, ESQ.
17 UNITED STATES ATTORNEY
18 BY: JEFFREY GOLDBERG, AUSA
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21 For the Defendants: SARITA KEDIA, ESQ.
22 For Deft A. Persico
23 (Not Present).
24 ROBERT LA RUSSO, ESQ.
25 For Deft J. DeRoss

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Paul J. Lombardi, RMR, FCRR
US District Court Reporter

1 THE CLERK: For oral argument or hearing, US v
2 Alphonse Persico and John DeRoss.

3 Please state your appearances.

4 MR. GOLDBERG: Jeffrey Goldberg for the
5 government.

6 Good morning, your Honor.

7 THE COURT: Good morning, Mr. Goldberg.

8 It might not be. We'll see.

9 MS. KEDIA: Good morning, your Honor. Sarita
10 Kedia for Mr. Persico, and your Honor has waived
11 Mr. Persico's appearance.

12 THE COURT: I have, and you have gotten
13 communication from your client saying he waived his
14 appearance here and he did it in writing?

15 MS. KEDIA: He did not, but I certainly can
16 submit a letter.

17 THE COURT: If you would so the record is
18 complete.

19 MS. KEDIA: Absolutely.

20 MR. LA RUSSO: And Robert LaRusso for
21 Mr. DeRoss.

22 Good morning, your Honor.

23 THE COURT: Good morning, Mr. LaRusso, and
24 Mr. DeRoss.

25 Well, having been advised that there were

1 several witnesses who had been subpoenaed. Mr. LaRusso,
2 you had presented those subpoenas and also Ms. Kedia, I
3 think you had also done that.

4 I was rather shocked when I came in this morning
5 to learn that the government has chosen not to produce
6 these people. You had six days' notice, Mr. Goldberg, to
7 get them in. You never raised any of these Toughy or the
8 federal rights requiring certain things be done when
9 Mr. LaRusso spoke to you.

10 MR. GOLDBERG: I actually did, your Honor.

11 THE COURT: When did you do that?

12 MR. GOLDBERG: Mr. LaRusso is mistaken on that
13 point.

14 When he e-mailed me the next day I called him
15 and told him we had a question whether in fact this was an
16 evidentiary hearing. We are past that.

17 I also told him that I was informed that at
18 least one of the witnesses, Ms. Mayer, would be out of the
19 D.C. area. She's now in Washington, D.C. in main justice
20 and I said we also had the Toughy issue. I don't know if
21 he remembers that, but I did say it.

22 It's not like I mentioned this for the first
23 time on Saturday. I did mention it beforehand.

24 THE COURT: Mr. LaRusso, you remember one way or
25 the other on this?

1 MR. LA RUSSO: Again, I know Mr. Goldberg and I
2 know he wouldn't make a misrepresentation.

3 I don't remember it, Judge, to be very honest
4 with you. There was a lot being discussed at that time.

5 The telephone conversation we had was primarily
6 concerning whether or not a hearing was going to be taking
7 place, and we discussed the necessity of witnesses. I
8 also indicated, I believe there was a voice mail follow-up
9 that we also were going to press for any documentation
10 that may relate to any of the issues that would be very
11 relevant during the course of the hearing.

12 But I think it comes down to this, very simply,
13 Judge; this idea of Toughy is really a mask for what
14 really happens. These witnesses, primarily Gary
15 Pontecorvo and Amy Walsh are really the two critical
16 witnesses on one of the issues.

17 We never had a problem in terms of producing
18 government witnesses before.

19 MS. KEDIA: Your Honor, if I may just add
20 because I'm the one who subpoenaed Ms. Walsh.

21 Certainly no issue was raised with me regarding
22 Toughy regulations. I never received a phone call from
23 Mr. Goldberg after I subpoenaed Ms. Walsh. I served her
24 directly and she indicated she would accept service of the
25 subpoena.

1 That's the last I heard of her telling me she
2 was unavailable between 11 and 2.

3 MR. GOLDBERG: Your Honor, so we are clear on
4 this, in Mr. LaRusso's defense, most of the conversation
5 that we had was about the question of whether this was a
6 hearing on the motions or an evidentiary hearing. And
7 although I'm certain I mentioned the Toughy regulations,
8 it wasn't a primary focus of our conversation.

9 So the record is clear, I told Mr. LaRusso what
10 I think we should do to clarify the hearing issue is to
11 have a conference call with the court, with Ms. Kedia, and
12 simply ask the questions if it's the court's intention to
13 have an evidentiary hearing or a hearing on the motions.

14 Mr. LaRusso called me back an hour later and
15 said I have spoken with Ms. Kedia. She doesn't want to
16 call the court.

17 MR. LA RUSSO: It wasn't a matter of I don't
18 want to call the court.

19 It was a decision made by both counsel that it
20 was pretty clear when we look at your order that a hearing
21 was had on the issues relative to the Rule 33.

22 When I was doing in my voice mail, I was
23 advising Mr. Goldberg of our present status, that we
24 wanted to call the witnesses. We understand they might
25 not be available. So we are not going to yell and scream

1 that they are not going to be here. If they are not
2 available, they are not available.

3 But we also wanted to discuss the question of
4 documentation on the issue of the \$1.65 million. Is there
5 any record, whatsoever, that was the purpose of calling
6 him back to let him know we are going forward with the
7 hearing and we would like to at least discuss with the
8 court the documentation.

9 Granted, we had no control over the witness's
10 schedule. As a matter of fact, I even mentioned on the
11 call, I believe, that Ms. Mayer is not necessary, having
12 gone through the documentation a little closer, we have
13 narrowed it down to the two witnesses being Mr. Pontecorvo
14 and Amy Walsh.

15 I believe that was part of the voice mail as
16 well.

17 MR. GOLDBERG: I think, your Honor, we are
18 prepared to get past the Toughy issue, and this is why.

19 When this issue was first raised by the defense
20 in a Rule 33 motion, the trial assistants who are still in
21 Brooklyn, Mr. Buretta and I, started looking into it.
22 Certainly neither of the two of us were aware of those
23 issues prior to the trial.

24 THE COURT: What issues are we talking about?

25 MR. GOLDBERG: The issues of whether the

1 government was aware about the forfeiture/tax issue and
2 failed to disclose that to the defense prior to trial.

3 We looked into it. I spoke briefly with
4 Ms. Walsh only after she was contacted by Ms. Kedia, and I
5 raised the issue with Ms. Kedia just before this court
6 appearance and said, you know, we would probably be
7 willing to stipulate that the government was aware that
8 Peggy Cutolo was not required to pay tax on the money and
9 the defense was not informed of that fact before the trial
10 which, in my mind, based on the motion papers filed would
11 completely obviate the need for an evidentiary hearing.

12 In fact, Mr. LaRusso in his letter of yesterday,
13 the last sentence says, quote, in the event that the
14 government concedes that if the defense was not told about
15 the \$1.65 million, it may be that the witnesses', plural,
16 the witnesses' testimony is not necessary.

17 We are not trying to make an issue of Toughy,
18 but Toughy exists for a purpose, and that is to make sure
19 that Department of Justice employees permitted to testify
20 or give an affidavit or documents relating to the
21 performance of their own duties.

22 So for the purposes of this argument, your
23 Honor, and perhaps to obviate the need entirely on an
24 evidentiary hearing, we are prepared to stipulate that the
25 defense was not told about the forfeiture/tax issue prior

1 to Peggy Cutolo's testimony.

2 THE DEFENDANT: And the government knew about
3 the forfeiture/tax issue?

4 MR. GOLDBERG: And when I say the government,
5 I'm cognizant of the fact that the trial assistants in
6 this case are charged with the knowledge of prior
7 assistants' knowledge.

8 So I don't mean to suggest that Mr. Buretta,
9 Ms. Mayer, or I had any knowledge of the forfeiture/tax
10 issue personally and somehow intentionally withheld it or
11 suppressed it. But I am prepared to stipulate way back
12 when a decision was made by the US Attorney's Office to
13 not require Ms. Cutolo to forfeit or pay tax on that
14 money.

15 THE COURT: And do you know when that was made?
16 Is there any documentation who made the
17 decision?

18 MR. GOLDBERG: Well, Ms. Walsh was the primary
19 assistant on these matters, I believe, and she hasn't been
20 in the office for at least a year. I was almost going to
21 say two years, but I know at least a year.

22 I think she would have been involved in that
23 decision. But there are legal arguments we had within the
24 context of Rule 33 as to why all of this is a complete red
25 herring, mainly that the defense made effective use of the

1 information and overall it's immaterial.

2 I assume we'll get to those arguments, but I
3 wanted to alert the court.

4 MR. LA RUSSO: Your Honor, I'm a little shocked,
5 and I almost feel like they are trying to sweep a very
6 critical issue under the rug here.

7 We have two witnesses who testified at a murder
8 trial that \$1.65 million of illegal proceeds were taken by
9 Mrs. Cutolo, and used for her own family. She said that
10 she told the government, she mentions an agent's name, and
11 she mentions an assistant's name. \$1.65 million.

12 We know from one of the agents who testified
13 that during the process before she left the New York area,
14 and including the period of time she was in the safe
15 house, no mention was ever made of that money, whatsoever.
16 So a critical issue was whether she had perjured herself
17 in regards to that before the jury.

18 Now, Mr. Pontecorvo, the case agent gets on the
19 stand, and he attempts to provide corroborative
20 information to this jury to lead them to believe that
21 Peggy Cutolo was telling the truth. So he says, yes. I
22 learned about the money.

23 He tiptoes. He says I might have learned it
24 either before we left the New York area, or at the safe
25 house. But, yes. I talked to her about it and I saw the

1 money. He had the nerve to say that \$1.65 million in
2 illegal proceeds he never, ever wrote a 302 or made any
3 notes. But what he did say, he said he spoke to somebody
4 in the US Attorney's Office.

5 Judge, not only did Peggy Cutolo lie, but
6 Agent Pontecorvo has stretched the truth. What the
7 government is attempting to do here is to turn this into a
8 tax issue, into a matter of credibility, an impeachment
9 issue, as opposed to the heart of this whole hearing that
10 we are trying to get at.

11 Who in the government was told about this money,
12 and who in the government made a decision that
13 \$1.65 million of illegal proceeds were going to be kept by
14 the Cutolo family? It's outrageous to walk in here, and
15 to actually say to us, that it's a tax issue. All we
16 asked for, and what we attempted to do is to find out who
17 in the government would have authorized her to keep
18 \$1.65 million, and Mr. Goldberg comes in here and tells us
19 they don't know?

20 There's not a shred of evidence, documentary
21 proof regarding a decision that would be made by a
22 supervisor, more than likely the US Attorney himself or
23 maybe somebody from the IRS, and we have nothing? I'm
24 sorry, Judge. I'm passionate about this. I apologize for
25 raising my voice, but I don't think we should be sweeping

1 this issue under the rug.

2 Because I think we know that this whole case
3 hinged on the credibility of these witnesses and if an
4 agent deliberately lied during the course of this trial to
5 back up a critical witness in this case, there's no doubt
6 about the result. The government has an obligation, when
7 faced with these facts, to do justice, to interview the
8 witnesses, to determine whether or not perjury had
9 actually occurred.

10 I even think the court during the charge talked
11 about the government looked into the possibility of
12 bringing a complaint of perjury against Mr. Floridia and
13 Peggy Cutolo. I'm sure it's the furthest thing from their
14 mind, and after having spent so much time in this
15 courtroom and have the government come and give this type
16 of an argument is very disconcerting and that's the
17 concern I have.

18 Judge, we should be putting this issue to rest.
19 We should be calling Amy Walsh. We should be calling
20 Agent Pontecorvo. We should be making a determination
21 whether in fact he lied because the evidence is leading
22 right to that point and unfortunately it's also leading to
23 the point, Judge, that somebody's attempting to cover it
24 up in the government and that's also a very disheartening
25 matter.

1 So I ask the court to seriously consider setting
2 this down for a hearing and calling the necessary
3 witnesses and that's the position I'm taking.

4 THE COURT: Ms. Kedia, do you have something to
5 add?

6 MS. KEDIA: Yes, your Honor. Thank you.

7 With respect to Ms. Walsh, it's very telling
8 that Mr. Goldberg says she may have been the person who
9 was told. He has spoken to Ms. Walsh this week on this
10 issue. I explained to Ms. Walsh exactly what the issue
11 was.

12 And I can tell your Honor she seemed very
13 surprised to hear about \$1.65 million that Peggy Cutolo
14 was permitted to keep. She wouldn't directly respond to
15 my questions. She said she would like to speak to
16 Mr. Goldberg, understandably so, and I expected that to be
17 her response having been a former assistant in the
18 US Attorney's Office.

19 However, it does not seem to me she knew about
20 this \$1.65 million or that she made any decision to allow
21 Ms. Cutolo to keep it. If she did so, then the question
22 becomes when, exactly, was the decision made. Was there a
23 deal struck that Peggy Cutolo would come in and testify if
24 the government allowed her to keep this money?

25 We have one of two issues here. We either have

1 the cover-up that Mr. LaRusso just spoke of, in which case
2 the government didn't know about the \$1.65 million until
3 this trial, which I think seems to be the case based on
4 the nature of the witness's testimony. Or we have,
5 unquestionably, a Brady violation and then the question
6 is, exactly what is the Brady violation?

7 Where are the documents that would support the
8 government's position that it was told about \$1.65
9 million? There is no way. You can't be an assistant in
10 the US Attorney's Office and sneeze without going to your
11 supervisor. So the idea that some assistant made the
12 decision to allow Peggy Cutolo to keep \$1.65 million
13 without getting it approved through the ranks and there
14 being documents on this is absurd.

15 So in the first instance, where is the
16 documentation? If there isn't any that exists, I think we
17 can assume that no one in the US Attorneys Office was
18 told, and in the event that Amy Walsh wants to come in and
19 says she was told, we need a hearing.

20 Mr. Goldberg also misreads the letter he cited
21 to the court. The defense position is that if the
22 government wants to concede that it, meaning the
23 government, wasn't told about the \$1.65 million, then
24 there may not be any need for a hearing. If, in fact, it
25 wasn't told, it wasn't told.

1 We don't need Amy Walsh to come in here and say
2 it wasn't told.

3 THE COURT: How could they possibly say that,
4 Ms. Kedia, when you have Agent Pontecorvo on the stand
5 saying they knew about it at sometime?

6 What does that get you?

7 MR. GOLDBERG: And that he told the
8 US Attorney's Office.

9 THE COURT: Yes.

10 MS. KEDIA: So who is it --

11 THE COURT: They can't possibly stipulate to
12 that unless they believe that Agent Pontecorvo committed
13 perjury.

14 MS. KEDIA: I understand that, your Honor, and
15 that's exactly why we asked for the hearing and that's
16 exactly why we asked for the testimony of these witnesses.

17 Who was it that was told? When were they told?
18 What, exactly, was the nature of the deal that was made
19 with the Cutolo family? What is the story here?

20 That is an obligation that the government has to
21 reveal that to the defense, and based on that, the court
22 can make a determination whether the defense had
23 sufficient information at that time or not.

24 But without revealing exactly what the story
25 was, who was told, and under what circumstances precisely,

1 there can be no determination made, and a hearing is
2 necessary.

3 THE COURT: Let me ask you this, Ms. Kedia.

4 How is this information, Mrs. Cutolo keeping
5 \$1.65 million, how is that, one, exculpatory, and what is
6 the material difference that that made to the defense?

7 MS. KEDIA: The fact she was permitted to keep
8 it?

9 THE COURT: Yes.

10 I mean, you found out about it on
11 cross-examination, fair to say?

12 MS. KEDIA: That's fair to say.

13 THE COURT: And you made very effective use of
14 it during your cross-examination with Mrs. Cutolo.

15 MS. KEDIA: Well, I have two things that I could
16 say off the top of my head with respect to that.

17 THE COURT: All right.

18 MS. KEDIA: One is we opened on the fact that
19 William Cutolo had \$2.7 million in racketeering proceeds
20 that was missing.

21 So then to learn during the course of the trial
22 that the family actually had \$1.65 million, that's too
23 little too late, Judge. That's not something we should
24 have to stumble upon during cross-examination.

25 It certainly impacts the manner in which we

1 cross-examine witnesses and it certainly impacts our tact
2 that we take when we open to the jury and begin this case.
3 So there is no question that the government's failure to
4 reveal this information was material.

5 Secondly, if there was a deal made with
6 Mrs. Cutolo about whether she would come testify in the
7 event that she was allowed to keep this money, if, in
8 fact, she was not willing to testify, or speak to the
9 government, if she wasn't allowed to keep this money,
10 those are critical facts. If she wouldn't have attended
11 that proffer session unless she had the agreement from the
12 government, I can keep this money, that is a critical fact
13 that the defense must be permitted to know.

14 THE COURT: Mr. Goldberg.

15 MR. GOLDBERG: Your Honor, first of all, on the
16 opening statement I think Ms. Kedia's opening statement
17 was about five hours long, and I'm sure that minor point,
18 even if there is some relevance to it was lost on the
19 jury.

20 Second of all, during her entire summation,
21 which was extremely long, she never once made mention of
22 Peggy Cutolo's ability to keep or not pay taxes on this
23 money. I wrote this in my papers. If it was so relevant,
24 she would have made much of it during her argument.

25 When the government confers a benefit on a

1 witness, it's not required to produce all the witnesses
2 who were part of the decision to confer that benefit.
3 When the government gives money to a cooperating witness
4 for relocation, for example, it's not required to call in
5 the US Marshal's Service to testify about what went into
6 making that decision.

7 A benefit was apparently conferred on
8 Peggy Cutoło. That benefit was that she was not -- she
9 was allowed, rather, to keep the money and not pay taxes
10 on it. Ms. Kedia had that information. Mr. LaRusso had
11 that information during the entire trial.

12 You will recall, she was one of the first
13 witnesses to testify. They were able to make effective
14 use of it, and in Rittweger, R-I-T-T-W-E-G-E-R, there is a
15 great example of this.

16 In **Rittweger**, the government made an untimely
17 disclosure of prior grand jury testimony and some
18 debriefing notes, and the Second Circuit held there was no
19 Brady violation whatsoever because, quote, first and
20 foremost, end quote, the defense had the information, and
21 was able to make use of it. It went before the jury.

22 That's the exact same situation we have here.
23 What the defense is trying to do is, they are trying to
24 seize upon the government's, I don't want to say failure,
25 because there was no intentional withholding here, but the

1 fact the defense did not have that information, to have
2 some sort of blown up evidentiary hearing and call in all
3 the witnesses that were involved in conferring that
4 benefit, it's not necessary.

5 We are prepared to concede that the defense
6 should have been told about that information but they
7 weren't. But the bottom line is under **Gill** and the cases
8 that follow there's no Brady violation here because they
9 made effective use and it's immaterial.

10 THE COURT: Isn't there a Giglio violation?

11 MR. GOLDBERG: That's what it is, at best.

12 It's not a Brady violation. It's a Giglio
13 violation. And Mr. LaRusso's argument confuses me,
14 because in the beginning of his long colloquy, he says
15 it's not about credibility, but in the end he says this is
16 all about credibility. And the cases are very clear that
17 if the Giglio information merely provides an additional
18 basis for challenging the credibility of the witness, it
19 can't be material.

20 We put in our papers, and we explained that
21 Ms. Kedia and Mr. LaRusso spent a large part of their
22 summations attacking the credibility of Ms. Cutolo on
23 various bases. What more would the forfeiture/tax issue
24 have given them and, more importantly, they had it.

25 They obviously didn't think it was so important.

1 They didn't use it.

2 MR. LA RUSSO: Your Honor, just briefly.

3 Let me see if I can bring the government back to
4 the issue we are actually raising.

5 The \$1.65 million first came out during
6 Barbara-Jean Cardinale's cross-examination by Ms. Kedia
7 and I believe Mr. Goldberg now admitted probably the first
8 time he or Ms. Mayer or Mr. Buretta ever heard about it
9 and certainly the defense ever heard about it. And we
10 know Peggy Cutolo's testimony about the \$1.65. I won't
11 review it. The court knows our position with regards to
12 it.

13 But what happens is now Gary Pontecorvo takes
14 the stand and here is a case agent in the stand who says,
15 in fact, he had a conversation with Peggy. He actually
16 saw the money in a suitcase.

17 Let me tell you, it stretches one's imagination
18 to believe that a case agent, who is well aware of his
19 obligations, is not going to notify his own supervisors.
20 Clearly he's notifying the US Attorney's Office and you
21 are going to see some kind of report prepared.

22 And all we get, Judge, is some assistant must
23 have been told. We have oral testimony which I suggest to
24 the court stretches the imagination, the believability.
25 What we have, Judge, are these general statements that

1 somebody must have been told.

2 It comes pretty close, Judge, to the fact that
3 nobody was told, that Mr. Pontecorvo first made that
4 testimony up here to back up Peggy Cutolo. That's the
5 worst situation, and what we are trying to do, Judge, is
6 to make a determination, based upon the facts, whether, in
7 fact, perjury actually occurred during the course of this
8 trial, not whether it's a Brady or Giglio violation in the
9 sense that Mr. Goldberg is saying. But in terms of a case
10 agent committing perjury during the course of the trial to
11 try to provide credibility for a critical witness in this
12 case.

13 And, Judge, you have been a judge in many
14 criminal cases and where issues like this arise, there's
15 documentation; there are reports; there are notes.
16 There's no question you would know who you discussed this
17 \$1.65 million with that doesn't belong to the Cutolo
18 family. That's illegal proceeds. That's forfeitable
19 assets. That's not a decision an agent or even an
20 assistant can make.

21 That's a decision that has to be made higher up,
22 and to come in here and say we don't know who was told in
23 the US Attorney's Office, and we still haven't heard,
24 Judge, whether there's any documentation, whatsoever,
25 existing to support the government's claim that this must

1 have been told to the United States Attorney.

2 I suggest to the court that there is a clear
3 indication that it didn't happen the way the government
4 says, and if a case agent lies during the course of this
5 trial, we are in a totally different situation. That's
6 the point that we are making, or I am making on behalf of
7 Mr. DeRoss, your Honor.

8 MR. GOLDBERG: And, your Honor --

9 MS. KEDIA: Your Honor --

10 MR. GOLDBERG: This is a very straightforward
11 issue.

12 Peggy Cutolo testified, I believe, that she told
13 the government about the money. Gary Pontecorvo, who was
14 called by the defense, says, yes. I was told by
15 Peggy Cutolo about the money and I told the US Attorney's
16 Office. The defense wants to confirm that fact through an
17 evidentiary hearing.

18 We are prepared to stipulate to the fact that
19 someone in the US Attorney's Office, probably Ms. Walsh,
20 and the only reason I'm hedging on that is because,
21 despite what Ms. Kedia says, I haven't had extensive
22 conversations with Ms. Walsh about this --

23 THE COURT: Mr. Goldberg, you are telling me you
24 never said to Ms. Walsh, do you remember this issue about
25 the money with Peggy Cutolo?

1 MR. GOLDBERG: I did.

2 THE COURT: Do you know who authorized it? When
3 did you first learn it?

4 You never asked her questions like that?

5 MR. GOLDBERG: I didn't go through a detailed
6 recitation of the time line.

7 I did, of course, say, do you recall ever, you
8 know, making decisions about that, and she generally said,
9 yeah. A decision was made. I have a recollection of
10 that.

11 I'm only couching what I'm saying because I
12 don't want to be later put in a brief as admitting to a
13 fact that I'm not certain about. There's really nothing
14 here. There's no evidence, whatsoever, that
15 Agent Pontecorvo testified untruthfully about that fact.

16 But, in any event, I don't want to lose sight of
17 the larger point here. It's completely immaterial and
18 irrelevant under Rule 33, and I have made my argument
19 about that and will rely on the papers.

20 THE COURT: Yes.

21 MS. KEDIA: Your Honor, with respect to what
22 Mr. Goldberg just said, can we find out what was actually
23 said?

24 He says on behalf of the government, I don't
25 want to make any misrepresentations for them to be cited

1 in a brief. Well, what is the true story? Mrs. Cutolo
2 didn't just get up on the stand and testify she told
3 agents.

4 She said at a proffer session, she only had two,
5 one was in February of 2001, and the other wasn't until
6 after the trial in the first case of 2006, she said the
7 proffer session in February of 2001, she informed the
8 government of the \$1.65 million.

9 We have notes from those proffer sessions.

10 THE COURT: It's not mentioned.

11 MS. KEDIA: Of course it's not mentioned.

12 The agent who took the notes at the proffer
13 session says she has absolutely no recollection of hearing
14 about \$1.65 million. Was Ms. Walsh told at the proffer
15 session or was she told before the proffer session or
16 after the proffer session and what exactly was done here?
17 What is it that the government agreed to do?

18 Simply to allow this woman if, in fact,
19 Ms. Walsh was told and, again, without having her here or
20 an affidavit from her saying, yes, I was told and I made
21 this decision and here's how I went about making it, what
22 was the decision that was made?

23 Was it, Mrs. Cutolo, if you come in and talk to
24 us, then we will consider allowing you to keep this \$1.65
25 million that I have heard about now from Agent Pontecorvo?

1 Or was it something else?

2 MR. GOLDBERG: Again, Judge, what's the point?

3 What's the end game here?

4 Let's assume, for the sake of argument, that
5 Agent Pontecorvo tells Ms. Walsh, Ms. Walsh has all kinds
6 of discussions, let's assume a supervisor's involved.
7 Let's assume she sneezes and gets a supervisor involved.
8 What's the point? What's the end game?

9 It's completely irrelevant. You asked
10 Ms. Kedia, what's the relevance here and she couldn't
11 answer you and the reason she couldn't answer you is
12 because there is no relevance to that added benefit that
13 was provided to Peggy Cutolo that came out during the
14 trial that she could have used in summation.

15 It was merely an additional basis and the case
16 law is clear, if there is an additional basis for
17 challenging the impeachment of a witness, it's not
18 relevant. It's not material.

19 MS. KEDIA: Your Honor, if I may respond briefly
20 to that.

21 **Rodriguez** makes this very clear. The Second
22 Circuit in **Rodriguez**, the assistant did exactly what the
23 assistant is trying to do there. He said that he elicited
24 from the witness and in that case it wasn't a situation
25 where the defense happened to stumble upon it during

1 cross-examination. It was a situation where during the
2 direct examination of the witness, the government brought
3 out that the witness said, I think it was in that case the
4 witness lied about certain things during her first proffer
5 session with the government.

6 The Second Circuit said, we can't know whether
7 it was material or not, even though the defense
8 cross-examined the witness and certainly attacked the
9 credibility of the witness, we can't know whether the lies
10 and whether the substance of that failure to disclose by
11 the government was material unless we know exactly what
12 that information was, and the Second Circuit remanded the
13 case to the district court and said, we got to find out
14 what the information was.

15 But we are missing the first point here and
16 Mr. Goldberg keeps trying to just brush past it. The
17 first point is if, in fact, the government wasn't told, if
18 Ms. Walsh wasn't told at that proffer session about the
19 \$1.65 million, as Mrs. Cutoło claims she was, that is
20 perjury that the government failed to cure, and it had an
21 obligation to do so.

22 And the obligation doesn't just arise because
23 these three assistants sitting at the table knew or didn't
24 know about it. They had an obligation to go back and
25 check whether, in fact, that witness was telling the

1 truth, and if she was not telling the truth about that,
2 that is the government's burden to prove. And the
3 government is trying desperately not to address that
4 issue.

5 It keeps saying what does it matter if there is
6 a Brady violation here.

7 THE COURT: No.

8 MS. KEDIA: That's not --

9 THE COURT: What they are saying is, what does
10 it matter if there is a Giglio violation.

11 MS. KEDIA: I put those in the same category,
12 and that's fine. We can call it either-or.

13 But we haven't established that that's the case.
14 We first need to establish who was told, if anyone, in the
15 United States Attorney's Office and when.

16 MR. LA RUSSO: Your Honor, just briefly in
17 response to Mr. Goldberg.

18 He says assume the supervisor was apprised or
19 somebody in the US Attorney's Office was told. That's the
20 way they want to phrase it. Let's assume no supervisor or
21 anybody in the office was told.

22 Where does that leave the record? That leaves
23 the record possibly with two witnesses that committed
24 material perjury during the course of the trial.

25 Ms. Kedia just brought up another point that we

1 hadn't discussed earlier, and that is on the direct
2 examination of Peggy Cutolo, after Barbara-Jean had let
3 the cat out of the bag, the government actually asks on
4 direct examination about the \$1.65 million and says when
5 you first spoke with the government, did you tell the
6 government about the money, and she answers yes. They
7 were eliciting information that they know is false or
8 should have known was false.

9 And they had, as Ms. Kedia says, an obligation
10 to correct the wrong. That's subornation of perjury. That
11 is --

12 THE COURT: I think that term is not applicable.

13 MR. LA RUSSO: It's a harsh term, Judge, but in
14 the course of a trial you are not thinking clearly about
15 these issues.

16 I think in the course of a trial you hear about
17 the \$1.65 and, gosh. We never knew. Mrs. Cutolo, did you
18 tell anybody? Yes. I told anybody and they accepted it.

19 I'm not saying they did it deliberately, but now
20 we are in a different situation. Now we have a chance and
21 clearly the facts indicating it to show what happened.
22 It's Peggy Cutolo lied about it and Agent Pontecorvo did
23 not have the conversations he said he had with assistants
24 about the money, that there was a cover-up here and the
25 government has a clear obligation, I thought it would have

1 been done before today, to find out if, in fact, there was
2 somebody in the government who specifically told them
3 about this money.

4 Judge, you can't just come in and say an
5 assistant learned about \$1.65 million and had a vague
6 recollection about that and they were permitting a witness
7 to keep it. Judge, that stretch's the imagination beyond
8 any possible believability.

9 That's what we are having here, Judge. We are
10 not putting the issue the way the government says. It's
11 whether or not perjury had been committed and the
12 government has condoned it or allowed it to exist.

13 MR. GOLDBERG: Your Honor, Mr. LaRusso just
14 conceded that the government raised the issue of the
15 \$1.65 million on direct.

16 But, putting that aside, **Rodriguez** is completely
17 inapposite. **Rodriguez** was a remand to determine if the
18 material withheld or not disclosed was material. Here we
19 know precisely what it is that the defense wanted prior to
20 trial. They wanted to be informed that Mrs. Cutolo was
21 able to keep the forfeiture, to keep the \$1.65 million.

22 The case on point here is **Rittweger** where the
23 information did come out and it was not material and they
24 made effective use. This is, again, an attempt by the
25 defense to take a potential Giglio violation and blow it

1 up into a full-blown hearing and accuse agents and
2 witnesses of committing perjury and to accuse prosecutors
3 of suborning perjury.

4 And I don't even know how to respond to that
5 accusation, but it's clearly irrelevant and a collateral
6 attack and immaterial --

7 MS. KEDIA: Your Honor --

8 THE COURT: Final argument, Ms. Kedia.

9 MS. KEDIA: I will briefly address the last
10 argument that he made about **Rittweger**.

11 That has nothing to do with this case. The
12 government a week before the trial in **Rittweger** produced
13 the information. A week before the defense opened in the
14 case, the government produced the information that was at
15 issue. In that case it was grand jury testimony of a
16 witness, and the question was, was that a little too late.

17 The question wasn't whether the government
18 failed to disclose information all together, whether the
19 government, even to this day, had failed to disclose
20 information. That's what **Rodriguez** addressed.

21 What Mr. Goldberg just said about **Rodriguez** is
22 exactly right. In that case the issue was what was it,
23 what was the substance of the disclosure that the
24 government failed to provide to the defense.

25 MR. GOLDBERG: Your Honor, this is **Rittweger** at

1 Westlaw page eight, probably in the stacks by now, the
2 paragraph beginning under the circumstances of this case
3 we conclude there is no probability that the government's
4 late disclosure of the evidence resulted in a different
5 outcome in the defendant Branden's case.

6 And they go through and explain why. Never once
7 does the Second Circuit say that the information was
8 disclosed prior to trial. That's not a basis upon which
9 the Second Circuit held that they made effective use.

10 They said, first and foremost, the district
11 court admitted into evidence Allen's grand jury testimony
12 and Agent Lavit's debriefing notes. They read that she
13 believed Branden did not know he was the sole signatory
14 for all CBL insured trustee accounts. The jury was also
15 read excerpts of the notes taken by Agent Lavit during
16 proffer interviews of Allen including statements that
17 Branden was never told that he was not a signatory on
18 CBL's accounts.

19 Now, not once at this point has the Second
20 Circuit mentioned that the information was provided before
21 the trial started.

22 MS. KEDIA: If I may borrow the case from
23 Mr. Goldberg, I can show him where the Second Circuit
24 mentioned the information was provided prior to trial.

25 MR. GOLDBERG: It was, but this was not the

1 basis for the Second Circuit's holding.

2 The exculpatory information was therefore put
3 before the jury and Branden was able to assimilate the
4 materials into his case for its effective use at trial
5 citing Coppa, C-O-P-P-A, and that was the decision.

6 We have the exact same reasoning and situation.
7 Whether the information was provided to the defense before
8 trial or whether the defense, quote-unquote, stumbled upon
9 it during cross-examination, the information was put
10 before the jury, and the defense in this case, if they
11 wanted to, was able to make effective use of it.

12 They obviously didn't deem it material because
13 they didn't mention it during their summation.

14 MS. KEDIA: Judge, we still don't know what the
15 information was.

16 That's the difference.

17 MR. GOLDBERG: The information --

18 MS. KEDIA: To this moment, we still don't know
19 the substance of the discussions that were had, if any,
20 about this \$1.65 million.

21 When did they have it? Did they have it at the
22 proffer session like Peggy Cutoolo said they did. If they
23 didn't, that's perjury by a witness that the government
24 had an obligation to cure. We haven't answered that
25 question. We haven't even gotten anywhere near where

1 **Rittweger** gets.

2 The information was fully disclosed, even the
3 portion Mr. Goldberg just read to the court, the
4 information was fully submitted to the jury. They were
5 given every document that the government handed to the
6 defense a week before trial. They were given the full
7 grand jury testimony of the witness, and they were given
8 the notes that the government handed the defense before
9 the trial.

10 And, more than likely, it doesn't really say so
11 in this case, but more than likely they were given this
12 material, which would ordinarily not be given to the jury.
13 You don't ordinarily hand to the jury grand jury testimony
14 of a witness, but it was probably done in an effort to
15 make the case fair because the defense got it at the last
16 minute in that particular case.

17 But the point is, in that case, it was fully
18 submitted. It was fully disclosed during the trial. They
19 knew exactly what they were dealing with. We don't here.
20 That is the point that we are trying to make.

21 We don't know if, in fact, Peggy Cutoło was
22 telling the truth or not at this moment about whether she
23 disclosed the \$1.65 million to the government at that
24 proffer session or not.

25 THE COURT: What difference does it make if she

1 told the government at the proffer session or if she told
2 the government an hour before she hit the stand?

3 MS. KEDIA: It's perjury.

4 THE COURT: How is it perjury?

5 MS. KEDIA: She claimed that she told the
6 government at the proffer session in 2001, specifically
7 named Assistant United States Attorney Amy Walsh that she
8 had told them at that time, and that she was permitted to
9 keep the money.

10 If that wasn't the case, your Honor, that's
11 perjury.

12 THE COURT: So for the sake of your argument,
13 she commits perjury.

14 How does that affect the result in this trial,
15 the conviction?

16 MS. KEDIA: It's virtually automatic according
17 to the Second Circuit.

18 If a witness commits perjury and the government
19 fails to cure the perjury and obviously the government has
20 an obligation to know everything that every assistant in
21 the case knew or didn't know before it, whether these
22 three prosecutors knew or not, that's failing to cure
23 perjury and reversal is automatic.

24 MR. GOLDBERG: There's no evidence to support
25 the suggestion that she lied on that point.

1 I'm sure Ms. Kedia will point to the interview
2 notes that it's not in there. It wouldn't be the first
3 time that a witness said something in a meeting and it
4 wasn't put down. But Ms. Kedia talks about information.
5 I just quoted from **Rittweger** and I talked about making
6 effective use of the information.

7 Ms. Kedia says we don't have the information.
8 Her April 21st letter says, in spite of the witness's
9 claims that the government had been informed about the
10 cash, and that they were not required to forfeit the
11 money, nor were they required to pay taxes on it, the
12 government failed to provide the defense with this
13 information as it was most certainly required to do under
14 Brady, Giglio, if, in fact, such information was known to
15 it.

16 What Ms. Kedia is doing is, she's changing her
17 position of what information she wants. Initially in her
18 papers she wants to know whether the government failed
19 under its obligations to inform the defense about simply
20 whether Ms. Cutolo was allowed to keep or pay taxes on
21 that money.

22 She has that information, faced with the legal
23 argument about immateriality and effective use, she's now
24 saying, well, I don't want that information. I want more
25 information. I want full-blown analysis of who made what

1 decision. I want internal US Attorney's Office documents.
2 We really need to get to the bottom of this.

3 What's the point? The point is that she had the
4 information she needed, a benefit apparently conferred on
5 a witness, and she could have used it. I find myself now
6 rehashing my arguments, but they are so relevant.

7 THE COURT: Is there anything else?

8 MS. KEDIA: Your Honor, if there are any
9 internal US Attorney's Office documents that should have
10 been turned over to the defense prior to the trial, why
11 isn't the government producing them now?

12 Maybe we don't need to get to hearings with the
13 witnesses and everything if, in fact, there is such
14 documentation that exists? It's because we expect it
15 doesn't exist, otherwise it would have been provided, at a
16 minimum, to the court, if not to the defense by this point
17 in time.

18 If no such documentation exists, then we need
19 the testimony of these witnesses to confirm or deny
20 whether they were actually told, and when and what was the
21 substance of the agreement, if any, made with
22 Peggy Cutoło.

23 MR. GOLDBERG: Judge, **Rittweger** and **Diaz** speak
24 to that.

25 THE COURT: It may be, Mr. Goldberg, but at this

1 point I want information from these witnesses. An
2 affidavit should be sufficient, I would think.

3 I want you to do a search to see when, if there
4 has been any notation and approval of this process.

5 MR. GOLDBERG: What we'll do, Judge, is a more
6 complete interview of Ms. Walsh, and if there are
7 documents readily available we'll try to find them.

8 THE COURT: And that would include any
9 additional information that Agent Pontecorvo may have had.

10 MR. GOLDBERG: Sure.

11 THE COURT: I don't think we need Ms. Mayer.

12 MS. KEDIA: I don't think we need her at this
13 point, certainly, your Honor.

14 MR. LA RUSSO: No.

15 MR. GOLDBERG: But I do want the court, of
16 course, even after that to keep in mind these cases --

17 THE COURT: I'm aware of the cases, **Rittweger**
18 and also **Rodriguez**.

19 MR. GOLDBERG: And **Diaz**.

20 THE COURT: And **Diaz**.

21 I'm also aware that the US Attorney's Office has
22 a pretty hefty obligation to abide by Brady and Giglio and
23 it may turn out to be a big waste of time in the end.

24 But I'd rather have the hearing now than two
25 years from now have it remanded.

1 MR. GOLDBERG: We'll try to find information,
2 Judge.

3 THE COURT: Thank you.
4 What date are we looking at to continue this
5 hearing?

6 MR. GOLDBERG: Your Honor --

7 MR. LA RUSSO: I have no more vacation.
8 So I'm free, Judge.

9 MR. GOLDBERG: Your Honor, we'd like some time
10 to look into this.

11 I know Mr. Buretta, he's been on vacation and
12 he's only recently back, he's available the second week in
13 July. If we could do it then, that would be best for the
14 government.

15 But whatever is best for the court, of course.

16 THE COURT: It may not require your actual
17 presence if we can get it done by affidavit.

18 MR. GOLDBERG: Sure.

19 MS. KEDIA: I would imagine that since we filed
20 the letter on April 21st, two months ago, that the
21 government has done some investigation into this.

22 MR. GOLDBERG: Your Honor, if we could have two
23 weeks to make a submission.

24 We'll do a submission within two weeks.

25 THE COURT: Let me just check.

1 (Whereupon, there was a pause in the
2 proceedings.)

3 THE COURT: Two weeks you are going to do your
4 submission and what do you need?

5 MS. KEDIA: Judge, if we could be back here in
6 two weeks that's perfectly fine, and we could see what it
7 is the government has to present.

8 Did your Honor want argument on the Rule 29
9 motions? Obviously there are various other outstanding
10 posttrial motions.

11 THE COURT: Yes.

12 MR. GOLDBERG: Your Honor, I don't know if there
13 is a need right now -- your Honor just said there may not
14 be a need to come back.

15 If we make our submission, if your Honor wants
16 to hear us further, I think we can set a date at that
17 time.

18 THE COURT: Why don't we see what the government
19 has in two weeks.

20 Then I'll give you a determination as to whether
21 or not we will have a hearing with live witnesses, not
22 have a hearing, and go on for oral argument on the Rule 29
23 and 33 motions.

24 MS. KEDIA: Very well, your Honor.

25 THE COURT: If that's even necessary.

1 MR. LA RUSSO: Very well, your Honor.

2 THE COURT: The papers are quite extensive.

3 MS. KEDIA: Very well.

4 MR. GOLDBERG: Is there a time, your Honor?

5 THE COURT: Two weeks from today, what does that
6 put us at?

7 THE CLERK: June 30th for the submission of
8 papers.

9 THE COURT: The 30th for the submission of
10 papers and I will make a decision after that and give you
11 a new date.

12 Both sides don't have any planned vacations in
13 the next month and a half? Ms. Kedia, you didn't get to
14 go on vacation, did you?

15 MS. KEDIA: No, your Honor.

16 THE COURT: All right.

17 I'll hear from you folks, and I'm sure I'll get
18 a reply after the government makes its submission from the
19 defense.

20 MR. GOLDBERG: Thank you, your Honor.

21 MR. LA RUSSO: Thank you, your Honor.

22 THE COURT: I'll make a determination as quickly
23 as I can because this case is rapidly aging and, although
24 it's not statutory or constitutional, I think the public
25 is entitled to have sentences go forward, if there is

1 going to be a sentence in this case, absent a new trial.

2 Have a nice day.

3 MR. GOLDBERG: Thank you, your Honor.

4 MS. KEDIA: Thank you, your Honor.

5 (The matter concluded.)

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\$	according [1] - 33:16	answer [2] - 24:11	8:12; 10:4; 12:18;
\$1.65 [29] - 6:4; 7:15; 9:8, 11; 10:1, 13, 18; 12:13, 20; 13:2, 8, 12, 23; 15:5, 22; 19:5, 10; 20:17; 23:8, 14, 24; 25:19; 27:4, 17; 28:5, 15, 21; 31:20; 32:23	accounts [2] - 30:14, 18	answered [1] - 31:24	13:10; 14:8; 19:20;
	accusation [1] - 29:5	answers [1] - 27:6	20:23; 21:15, 19;
	accuse [2] - 29:1	apologize [1] - 10:24	26:15, 19; 35:1, 9;
	actual [1] - 37:16	appearance [3] - 2:11, 14; 7:6	36:21
	add [2] - 4:19; 12:5	APPEARANCES [1] - 1:11	Attorneys [1] - 13:17
	added [1] - 24:12	appearances [1] - 2:3	AUSA [1] - 1:13
1	additional [4] - 18:17; 24:15; 36:9	applicable [1] - 27:12	authorized [2] - 10:17; 22:2
100 [1] - 1:22	address [2] - 26:3; 29:9	apprised [1] - 26:18	automatic [2] - 33:16, 23
10:10 [1] - 1:7	addressed [1] - 29:20	approval [1] - 36:4	available [5] - 5:25; 6:2; 36:7; 37:12
11 [1] - 5:2	admitted [2] - 19:7; 30:11	approved [1] - 13:13	aware [6] - 6:22; 7:1, 7; 19:18; 36:17, 21
11201 [1] - 1:14	admitting [1] - 22:12	April [2] - 34:8; 37:20	
11722 [1] - 1:22	advised [1] - 2:25	area [3] - 3:19; 9:13, 24	B
1180 [1] - 1:22	advising [1] - 5:23	ARGUMENT [1] - 1:8	bag [1] - 27:3
16 [1] - 1:6	affect [1] - 33:14	argument [13] - 2:1; 7:22; 11:16; 16:24; 18:13; 22:18; 24:4; 29:8, 10; 33:12; 34:23; 38:8, 22	Barbara [2] - 19:6; 27:2
2	affidavit [4] - 7:20; 23:20; 36:2; 37:17	arguments [3] - 8:23; 9:2; 35:6	Barbara-Jean [2] - 19:6; 27:2
2 [1] - 5:2	agent [8] - 9:18; 11:4; 19:14, 18; 20:10, 19; 21:4; 23:12	arise [2] - 20:14; 25:22	based [4] - 7:10; 13:3; 14:21; 20:6
2.7 [1] - 15:19	Agent [11] - 10:6; 11:20; 14:4, 12; 22:15; 23:25; 24:5; 27:22; 30:12, 15; 36:9	aside [1] - 28:16	bases [1] - 18:23
2001 [3] - 23:5, 7; 33:6	agent's [1] - 9:10	assets [1] - 20:19	basis [5] - 18:18; 24:15; 30:8; 31:1
2006 [1] - 23:6	agents [3] - 9:12; 23:3; 29:1	assimilate [1] - 31:3	becomes [1] - 12:22
2008 [1] - 1:6	aging [1] - 39:23	assistant [10] - 8:19; 12:17; 13:9, 11; 19:22; 20:20; 24:22; 28:5; 33:20	BEFORE [1] - 1:9
21st [2] - 34:8; 37:20	ago [1] - 37:20	Assistant [1] - 33:7	beforehand [1] - 3:23
29 [2] - 38:8, 22	agreed [1] - 23:17	assistant's [1] - 9:11	begin [1] - 16:2
3	agreement [2] - 16:11; 35:21	assistants [4] - 6:20; 8:5; 25:23; 27:23	beginning [2] - 18:14; 30:2
302 [1] - 10:2	alert [1] - 9:3	assistants' [1] - 8:7	behalf [2] - 21:6; 22:24
30th [2] - 39:7, 9	Allen [1] - 30:16	assume [7] - 9:2; 13:17; 24:4, 6-7; 26:18, 20	believability [2] - 19:24; 28:8
33 [5] - 5:21; 6:20; 8:24; 22:18; 38:23	Allen's [1] - 30:11	attack [1] - 29:6	belong [1] - 20:17
6	allow [3] - 12:20; 13:12; 23:18	attacked [1] - 25:8	benefit [7] - 16:25; 17:2, 7-8; 18:4; 24:12; 35:4
631 [2] - 1:22	allowed [6] - 12:24; 16:7, 9; 17:9; 28:12; 34:20	attacking [1] - 18:22	best [3] - 18:11; 37:13, 15
7	allowing [1] - 23:24	attempt [1] - 28:24	between [1] - 5:2
712-6106 [1] - 1:22	almost [2] - 8:20; 9:5	attempted [1] - 10:16	beyond [1] - 28:7
712-6122 [1] - 1:22	ALPHONSE [1] - 1:6	attempting [2] - 10:7; 11:23	big [1] - 36:23
A	Alphonse [1] - 2:2	attempts [1] - 9:19	blow [1] - 28:25
a.m [1] - 1:7	AMERICA [1] - 1:3	attended [1] - 16:10	blown [3] - 18:2; 29:1; 34:25
abide [1] - 36:22	Amy [6] - 4:15; 6:14; 11:19; 13:18; 14:1; 33:7	Attorney [3] - 10:22; 21:1; 33:7	borrow [1] - 30:22
ability [1] - 16:22	analysis [1] - 34:25	ATTORNEY [1] - 1:12	bottom [2] - 18:7; 35:2
able [5] - 17:13, 21; 28:21; 31:3, 11		Attorney's [14] -	Brady [9] - 13:5; 17:19; 18:8, 12; 20:8; 26:6; 34:14; 36:22
absent [1] - 40:1			
absolutely [1] - 23:13			
Absolutely [1] - 2:19			
absurd [1] - 13:14			
accept [1] - 4:24			
accepted [1] - 27:18			

Branden [3] - 30:13,
17; 31:3
Branden's [1] - 30:5
brief [2] - 22:12; 23:1
briefly [5] - 7:3;
19:2; 24:19; 26:16;
29:9
bring [1] - 19:3
bringing [1] - 11:12
Brooklyn [2] - 1:14;
6:21
brought [2] - 25:2;
26:25
brush [1] - 25:16
burden [1] - 26:2
Burette [4] - 6:21;
8:8; 19:8; 37:11
BY [1] - 1:13

C

Cardinale's [1] - 19:6
case [36] - 8:6; 9:18;
11:2, 5; 13:1, 3; 16:2;
19:14, 18; 20:9, 12;
21:4; 23:6; 24:15, 24;
25:3, 13; 26:13; 28:22;
29:11, 14-15, 22; 30:2,
5, 22; 31:4, 10; 32:11,
15-17; 33:10, 21;
39:23; 40:1
cases [5] - 18:7, 16;
20:14; 36:16
cash [1] - 34:10
CAT [1] - 1:25
cat [1] - 27:3
category [1] - 26:11
CBL [1] - 30:14
CBL's [1] - 30:18
Central [2] - 1:5, 22
certain [4] - 3:8; 5:7;
22:13; 25:4
Certainly [2] - 4:21;
6:22
certainly [7] - 2:15;
15:25; 16:1; 19:9;
25:8; 34:13; 36:13
challenging [2] -
18:18; 24:17
chance [1] - 27:20
changing [1] - 34:16
charge [1] - 11:10
charged [1] - 8:6
check [2] - 25:25;
37:25

chosen [1] - 3:5
Circuit [9] - 17:18;
24:22; 25:6, 12; 30:7,
9, 20, 23; 33:17
Circuit's [1] - 31:1
circumstances [2] -
14:25; 30:2
cited [2] - 13:20;
22:25
citing [1] - 31:5
claim [1] - 20:25
claimed [1] - 33:5
claims [2] - 25:19;
34:9
clarify [1] - 5:10
clear [8] - 5:3, 9, 20;
18:16; 21:2; 24:16, 21;
27:25
clearly [3] - 27:14,
21; 29:5
Clearly [1] - 19:20
CLERK [2] - 2:1; 39:7
client [1] - 2:13
close [1] - 20:2
closer [1] - 6:12
cognizant [1] - 8:5
collateral [1] - 29:5
colloquy [1] - 18:14
commits [2] - 33:13, 18
committed [3] - 14:12;
26:23; 28:11
committing [2] -
20:10; 29:2
communication [1] -
2:13
complaint [1] - 11:12
complete [3] - 2:18;
8:24; 36:6
completely [4] - 7:11;
22:17; 24:9; 28:16
concede [2] - 13:22;
18:5
conceded [1] - 28:14
concedes [1] - 7:14
concern [1] - 11:17
concerning [1] - 4:6
conclude [1] - 30:3
concluded [1] - 40:5
condoned [1] - 28:12
confer [1] - 17:2
conference [1] - 5:11
conferred [2] - 17:7;
35:4
conferring [1] - 18:3
confers [1] - 16:25
confirm [2] - 21:16;
35:19
confuses [1] - 18:13
consider [2] - 12:1;
23:24
constitutional [1] -
39:24
contacted [1] - 7:4
context [1] - 8:24
continue [1] - 37:4
control [1] - 6:9
conversation [4] -
4:5; 5:4, 8; 19:15
conversations [2] -
21:22; 27:23
conviction [1] - 33:15
cooperating [1] - 17:3
Coppa [1] - 31:5
COPPA [1] - 31:5
correct [1] - 27:10
corroborative [1] -
9:19
couching [1] - 22:11
counsel [1] - 5:19
course [13] - 4:11;
11:4; 15:21; 20:7, 10;
21:4; 22:7; 23:11;
26:24; 27:14, 16;
36:16; 37:15
COURT [49] - 1:1, 9;
2:7, 12, 17, 23; 3:11,
24; 6:24; 8:15; 12:4;
14:3, 9, 11; 15:3, 9,
13, 17; 16:14; 18:10;
21:23; 22:2, 20; 23:10;
26:7, 9; 27:12; 29:8;
32:25; 33:4, 12; 35:7,
25; 36:8, 11, 17, 20;
37:3, 16, 25; 38:3, 11,
18, 25; 39:2, 5, 9, 16,
22
court [19] - 5:11, 16,
18; 6:8; 7:5; 9:3;
11:10; 12:1; 13:21;
14:21; 19:11, 24; 21:2;
25:13; 30:11; 32:3;
35:16; 36:15; 37:15
Court [1] - 1:21
court's [1] - 5:12
Courthouse [1] - 1:5
courtroom [1] - 11:15
cover [3] - 11:23;

13:1; 27:24
cover-up [2] - 13:1;
27:24
CR-04-911 [1] - 1:4
credibility [8] -
10:8; 11:3; 18:15, 18,
22; 20:11; 25:9
criminal [1] - 20:14
critical [7] - 4:15;
9:6, 16; 11:5; 16:10,
12; 20:11
cross [8] - 15:11, 14,
24; 16:1; 19:6; 25:1,
8; 31:9
cross-examination [6]
- 15:11, 14, 24; 19:6;
25:1; 31:9
cross-examine [1] -
16:1
cross-examined [1] -
25:8
cure [4] - 25:20;
31:24; 33:19, 22
Cutolo [35] - 7:8;
8:13; 9:9, 21; 10:5,
14; 11:13; 12:13, 21,
23; 13:12; 14:19; 15:4,
14, 19; 16:6; 17:8;
18:22; 20:4, 17; 21:12,
15, 25; 23:1, 23;
24:13; 25:19; 27:2, 17,
22; 28:20; 31:22;
32:21; 34:20; 35:22
Cutolo's [3] - 8:1;
16:22; 19:10

D

D.C [2] - 3:19
date [3] - 37:4; 38:16;
39:11
days' [1] - 3:6
deal [3] - 12:23;
14:18; 16:5
dealing [1] - 32:19
debriefing [2] -
17:18; 30:12
decision [19] - 5:19;
8:12, 17, 23; 10:12,
21; 12:20, 22; 13:12;
17:2, 6; 20:19, 21;
22:9; 23:21; 31:5;
35:1; 39:10
decisions [1] - 22:8
deem [1] - 31:12
DEFENDANT [1] - 8:2

defendant [1] - 30:5
Defendants [2] - 1:7, 16
defense [36] - 5:4; 6:19; 7:2, 9, 14, 25; 8:25; 13:21; 14:21; 15:6; 16:13; 17:20, 23; 18:1, 5; 19:9; 21:14, 16; 24:25; 25:7; 28:19, 25; 29:13, 24; 31:7, 10; 32:6, 8, 15; 34:12, 19; 35:10, 16; 39:19
Deft [2] - 1:16, 18
deliberately [2] - 11:4; 27:19
deny [1] - 35:19
Department [1] - 7:19
DEROSS [1] - 1:6
DeRoss [5] - 1:18; 2:2, 21, 24; 21:7
desperately [1] - 26:3
despite [1] - 21:21
detailed [1] - 22:5
determination [6] - 11:20; 14:22; 15:1; 20:6; 38:20; 39:22
determine [2] - 11:8; 28:17
Diaz [3] - 35:23; 36:19
difference [3] - 15:6; 31:16; 32:25
different [3] - 21:5; 27:20; 30:4
direct [4] - 25:2; 27:1, 4; 28:15
directly [2] - 4:24; 12:14
disclose [4] - 7:2; 25:10; 29:18
disclosed [5] - 28:18; 30:8; 32:2, 18, 23
disclosure [3] - 17:17; 29:23; 30:4
disconcerting [1] - 11:16
discuss [2] - 6:3, 7
discussed [4] - 4:4, 7; 20:16; 27:1
discussions [2] - 24:6; 31:19
disheartening [1] - 11:24
DISTRICT [3] - 1:1, 9
district [2] - 25:13; 30:10
document [1] - 32:5
documentary [1] - 10:20
documentation [10] - 4:9; 6:4, 8, 12; 8:16; 13:16; 20:15, 24; 35:14, 18
documents [6] - 7:20; 13:7, 14; 35:1, 9; 36:7
done [7] - 3:3, 8; 23:16; 28:1; 32:14; 37:17, 21
doubt [1] - 11:5
down [4] - 4:12; 6:13; 12:2; 34:4
during [23] - 4:11; 9:13; 11:4, 10; 15:14, 21, 24; 16:20, 24; 17:11; 19:5; 20:7, 10; 21:4; 24:13, 25; 25:1, 4; 26:24; 30:15; 31:9, 13; 32:18
duties [1] - 7:21

E

e-mailed [1] - 3:14
EASTERN [1] - 1:1
effective [10] - 8:25; 15:13; 17:13; 18:9; 28:24; 30:9; 31:4, 11; 34:6, 23
effort [1] - 32:14
eight [1] - 30:1
either [3] - 9:24; 12:25; 26:12
either-or [1] - 26:12
elicited [1] - 24:23
eliciting [1] - 27:7
employees [1] - 7:19
end [5] - 17:20; 18:15; 24:3, 8; 36:23
entire [2] - 16:20; 17:11
entirely [1] - 7:23
entitled [1] - 39:25
ESQ [3] - 1:12, 16, 18
establish [1] - 26:14
established [1] - 26:13
event [4] - 7:13; 13:18; 16:7; 22:16
evidence [6] - 10:20; 11:21; 22:14; 30:4, 11; 33:24
evidentiary [7] - 3:16; 5:6, 13; 7:11, 24; 18:2; 21:17
exact [2] - 17:22; 31:6
exactly [12] - 12:10, 22; 13:6; 14:15, 18, 24; 23:16; 24:22; 25:11; 29:22; 32:19
examination [9] - 15:11, 14, 24; 19:6; 25:1; 27:2, 4; 31:9
examine [1] - 16:1
examined [1] - 25:8
example [2] - 17:4, 15
excerpts [1] - 30:15
exculpatory [2] - 15:5; 31:2
exist [2] - 28:12; 35:15
existing [1] - 20:25
exists [4] - 7:18; 13:16; 35:14, 18
expect [1] - 35:14
expected [1] - 12:16
explain [1] - 30:6
explained [2] - 12:10; 18:20
extensive [2] - 21:21; 39:2
extremely [1] - 16:21

F

faced [2] - 11:7; 34:22
fact [26] - 3:15; 6:10; 7:9, 12; 8:5; 11:21; 13:24; 15:7, 18; 16:8, 12; 18:1; 19:15; 20:2, 7; 21:16, 18; 22:13, 15; 23:18; 25:17, 25; 28:1; 32:21; 34:14; 35:13
facts [4] - 11:7; 16:10; 20:6; 27:21
failed [7] - 7:2; 25:20; 29:18, 24; 34:12, 18
failing [1] - 33:22
fails [1] - 33:19
failure [3] - 16:3; 17:24; 25:10
fair [3] - 15:11; 32:15
false [2] - 27:7
family [5] - 9:9; 10:14; 14:19; 15:22; 20:18
Fax [1] - 1:22
FCRR [1] - 1:21
February [2] - 23:5, 7
federal [1] - 3:8
Federal [1] - 1:22
filed [2] - 7:10; 37:19
Final [1] - 29:8
fine [2] - 26:12; 38:6
first [18] - 3:22; 6:19; 13:15; 16:15; 17:12, 19; 19:5, 7; 20:3; 22:3; 23:6; 25:4, 15, 17; 26:14; 27:5; 30:10; 34:2
five [1] - 16:17
Florida [1] - 11:12
focus [1] - 5:8
folks [1] - 39:17
follow [2] - 4:8; 18:8
follow-up [1] - 4:8
foremost [2] - 17:20; 30:10
forfeit [2] - 8:13; 34:10
forfeitable [1] - 20:18
forfeiture [1] - 28:21
forfeiture/tax [5] - 7:1, 25; 8:3, 9; 18:23
former [1] - 12:17
forward [2] - 6:6; 39:25
free [1] - 37:8
full [3] - 29:1; 32:6; 34:25
full-blown [2] - 29:1; 34:25
fully [4] - 32:2, 4, 17
furthest [1] - 11:13

G

game [2] - 24:3, 8
Gary [3] - 4:14; 19:13; 21:13
general [1] - 19:25
generally [1] - 22:8
Giglio [8] - 18:10, 12, 17; 20:8; 26:10; 28:25; 34:14; 36:22
Gill [1] - 18:7
given [6] - 18:24; 32:5-7, 11

GOLDBERG [36] - 1:13;
2:4; 3:10, 12; 5:3;
6:17, 25; 8:4, 18;
14:7; 16:15; 18:11;
21:8, 10; 22:1, 5;
24:2; 28:13; 29:25;
30:25; 31:17; 33:24;
35:23; 36:5, 10, 15,
19; 37:1, 6, 9, 18, 22;
38:12; 39:4, 20; 40:3

Goldberg [21] - 2:4,
7; 3:6; 4:1, 23; 5:23;
10:18; 12:8, 16; 13:20;
16:14; 19:7; 20:9;
21:23; 22:22; 25:16;
26:17; 29:21; 30:23;
32:3; 35:25

gosh [1] - 27:17

government [70] - 2:5;
3:5; 4:18; 7:1, 7, 14;
8:2, 4; 9:10; 10:7,
11-12, 17; 11:6, 11,
15, 24; 12:24; 13:2,
22-23; 14:20; 16:9, 12,
25; 17:3, 16; 19:3;
21:3, 13; 22:24; 23:8,
17; 25:2, 5, 11, 17,
20; 26:3; 27:3, 5-6,
25; 28:2, 10, 12, 14;
29:12, 14, 17, 19, 24;
31:23; 32:5, 8, 23;
33:1, 6, 18-19; 34:9,
12, 18; 35:11; 37:14,
21; 38:7, 18; 39:18

Government [1] - 1:12

government's [6] -
13:8; 16:3; 17:24;
20:25; 26:2; 30:3

grand [5] - 17:17;
29:15; 30:11; 32:7, 13

Granted [1] - 6:9

great [1] - 17:15

H

half [1] - 39:13
hand [1] - 32:13
handed [2] - 32:5, 8
harsh [1] - 27:13
head [1] - 15:16
hear [4] - 12:13;
27:16; 38:16; 39:17
heard [5] - 5:1; 19:8;
20:23; 23:25
hearing [27] - 2:1;
3:16; 4:6, 11; 5:6, 10,
13, 20; 6:7; 7:11, 24;

10:9; 12:2; 13:19, 24;
14:15; 15:1; 18:2;
21:17; 23:13; 29:1;
36:24; 37:5; 38:21
hearings [1] - 35:12
heart [1] - 10:9
hedging [1] - 21:20
hefty [1] - 36:22
held [2] - 17:18; 30:9
herring [1] - 8:25
herself [1] - 9:16
higher [1] - 20:21
himself [1] - 10:22
hinged [1] - 11:3
hit [1] - 33:2
holding [1] - 31:1
honest [1] - 4:3
Honor [42] - 2:6, 9-10,
22; 3:10; 4:19; 5:3;
6:17; 7:23; 9:4; 12:6,
12; 14:14; 16:15; 19:2;
21:7-9; 22:21; 24:19;
26:16; 28:13; 29:7, 25;
33:10; 35:8; 36:13;
37:6, 9, 22; 38:8,
12-13, 15, 24; 39:1, 4,
15, 20-21; 40:3
HONORABLE [1] - 1:9
hour [2] - 5:14; 33:2
hours [1] - 16:17
house [2] - 9:15, 25

I

idea [2] - 4:13; 13:11
illegal [4] - 9:8;
10:2, 13; 20:18
imagination [3] -
19:17, 24; 28:7
imagine [1] - 37:19
immaterial [4] - 9:1;
18:9; 22:17; 29:6
immateriality [1] -
34:23
impacts [2] - 15:25;
16:1
impeachment [2] -
10:8; 24:17
important [1] - 18:25
importantly [1] -
18:24
inapposite [1] - 28:17
include [1] - 36:8
including [2] - 9:14;
30:16

indicated [2] - 4:8,
24
indicating [1] - 27:21
indication [1] - 21:3
inform [1] - 34:19
information [42] -
9:1, 20; 14:23; 15:4;
16:4; 17:10, 20; 18:1,
6, 17; 25:12, 14; 27:7;
28:23; 29:13, 18, 20;
30:7, 20, 24; 31:2, 7,
9, 15, 17; 32:2, 4;
34:4, 6-7, 13-14, 17,
22, 24-25; 35:4; 36:1,
9; 37:1
informed [5] - 3:17;
7:9; 23:7; 28:20; 34:9
instance [1] - 13:15
insured [1] - 30:14
intention [1] - 5:12
intentional [1] -
17:25
intentionally [1] -
8:10
internal [2] - 35:1, 9
interview [3] - 11:7;
34:1; 36:6
interviews [1] - 30:16
investigation [1] -
37:21
involved [4] - 8:22;
18:3; 24:6
irrelevant [3] -
22:18; 24:9; 29:5
IRS [1] - 10:23
Islip [2] - 1:5, 22
issue [30] - 3:20;
4:21; 5:10; 6:4, 18-19;
7:1, 5, 17, 25; 8:3,
10; 9:6, 16; 10:8, 15;
11:1, 18; 12:10; 18:23;
19:4; 21:11, 24; 26:4;
28:10, 14; 29:15, 22
issues [9] - 4:10, 16;
5:21; 6:23-25; 12:25;
20:14; 27:15

J

Jean [2] - 19:6; 27:2
Jeffrey [1] - 2:4
JEFFREY [1] - 1:13
JOANNA [1] - 1:9
John [1] - 2:2
JOHN [1] - 1:6

JS [1] - 1:4
judge [1] - 20:13
JUDGE [1] - 1:9
Judge [24] - 4:3, 13;
10:5, 24; 11:18, 23;
15:23; 19:22, 25; 20:2,
5, 13, 24; 24:2; 27:13;
28:4, 7, 9; 31:14;
35:23; 36:5; 37:2, 8;
38:5
July [1] - 37:13
June [2] - 1:6; 39:7
jury [16] - 9:17, 20;
16:2, 19; 17:17, 21;
29:15; 30:11, 14; 31:3,
10; 32:4, 7, 12
justice [2] - 3:19;
11:7
Justice [1] - 7:19

K

Kedia [22] - 2:10; 3:2;
5:11, 15; 7:4; 12:4;
14:4; 15:3; 17:10;
18:21; 19:6; 21:21;
24:10; 26:25; 27:9;
29:8; 34:1, 4, 7, 16;
39:13
KEDIA [34] - 1:16; 2:9,
15, 19; 4:19; 12:6;
14:10, 14; 15:7, 12,
15, 18; 21:9; 22:21;
23:11; 24:19; 26:8, 11;
29:7, 9; 30:22; 31:14,
18; 33:3, 5, 16; 35:8;
36:12; 37:19; 38:5, 24;
39:3, 15; 40:4
Kedia's [1] - 16:16
keep [18] - 10:17;
12:14, 21, 24; 13:12;
15:7; 16:7, 9, 12, 22;
17:9; 23:24; 28:7, 21;
33:9; 34:20; 36:16
keeping [1] - 15:4
keeps [2] - 25:16; 26:5
kept [1] - 10:13
kind [1] - 19:21
kinds [1] - 24:5
knowledge [3] - 8:6, 9
known [2] - 27:8; 34:14
knows [1] - 19:11

L

LA [12] - 1:18; 2:20;
4:1; 5:17; 9:4; 19:2;

26:16; 27:13; 36:14;
37:7; 39:1, 21
large [1] - 18:21
larger [1] - 22:17
LaRusso [13] - 2:20,
23; 3:1, 9, 12, 24;
5:9, 14; 7:12; 13:1;
17:10; 18:21; 28:13
LaRusso's [2] - 5:4;
18:13
last [4] - 5:1; 7:13;
29:9; 32:15
late [3] - 15:23;
29:16; 30:4
Lavit [1] - 30:15
Lavit's [1] - 30:12
law [1] - 24:16
lead [1] - 9:20
leading [2] - 11:21
learn [3] - 3:5; 15:21;
22:3
learned [3] - 9:22;
28:5
least [4] - 3:18; 6:7;
8:20
leave [1] - 26:22
leaves [1] - 26:22
left [2] - 9:13, 24
legal [2] - 8:23; 34:22
letter [5] - 2:16;
7:12; 13:20; 34:8;
37:20
lie [1] - 10:5
lied [5] - 11:4, 21;
25:4; 27:22; 33:25
lies [2] - 21:4; 25:9
likely [3] - 10:22;
32:10
line [2] - 18:7; 22:6
live [1] - 38:21
Lombardi [1] - 1:21
look [2] - 5:20; 37:10
looked [2] - 7:3; 11:11
looking [2] - 6:21;
37:4
lose [1] - 22:16
lost [1] - 16:18

M

mail [3] - 4:8; 5:22;
6:15
mailed [1] - 3:14
main [1] - 3:19
manner [1] - 15:25

Marshal's [1] - 17:5
mask [1] - 4:13
material [12] - 15:6;
16:4; 18:19; 24:18;
25:7, 11; 26:24; 28:18,
23; 31:12; 32:12
materials [1] - 31:4
matter [7] - 5:17;
6:10; 10:8; 11:25;
26:5, 10; 40:5
matters [1] - 8:19
MAUSKOPF [1] - 1:12
Mayer [5] - 3:18; 6:11;
8:9; 19:8; 36:11
mean [2] - 8:8; 15:10
meaning [1] - 13:22
mechanical [1] - 1:24
meeting [1] - 34:3
mention [4] - 3:23;
9:15; 16:21; 31:13
mentioned [7] - 3:22;
5:7; 6:10; 23:10;
30:20, 24
mentions [2] - 9:10
merely [2] - 18:17;
24:15
might [3] - 2:8; 5:24;
9:23
million [28] - 6:4;
7:15; 9:8, 11; 10:1,
13, 18; 12:13, 20;
13:2, 9, 12, 23; 15:5,
19, 22; 19:5; 20:17;
23:8, 14, 25; 25:19;
27:4; 28:5, 15, 21;
31:20; 32:23
mind [3] - 7:10; 11:14;
36:16
minimum [1] - 35:16
minor [1] - 16:17
minute [1] - 32:16
misreads [1] - 13:20
misrepresentation [1]
- 4:2
misrepresentations
[1] - 22:25
missing [2] - 15:20;
25:15
mistaken [1] - 3:12
moment [2] - 31:18;
32:22
money [23] - 7:8; 8:14;
9:15, 22; 10:1, 11;
12:24; 16:7, 9, 12, 23;
17:3, 9; 19:16; 21:13,
15, 25; 27:6, 24; 28:3;
33:9; 34:11, 21
month [1] - 39:13
months [1] - 37:20
morning [6] - 2:6, 9,
22-23; 3:4
most [2] - 5:4; 34:13
motion [2] - 6:20; 7:10
motions [5] - 5:6, 13;
38:9, 23
MR [46] - 2:4, 20;
3:10, 12; 4:1; 5:3, 17;
6:17, 25; 8:4, 18; 9:4;
14:7; 16:15; 18:11;
19:2; 21:8, 10; 22:1,
5; 24:2; 26:16; 27:13;
28:13; 29:25; 30:25;
31:17; 33:24; 35:23;
36:5, 10, 14-15, 19;
37:1, 6-7, 9, 18, 22;
38:12; 39:1, 4, 20-21;
40:3
MS [33] - 2:9, 15, 19;
4:19; 12:6; 14:10, 14;
15:7, 12, 15, 18; 21:9;
22:21; 23:11; 24:19;
26:8, 11; 29:7, 9;
30:22; 31:14, 18; 33:3,
5, 16; 35:8; 36:12;
37:19; 38:5, 24; 39:3,
15; 40:4
murder [1] - 9:7
must [4] - 16:13;
19:22; 20:1, 25

N

name [2] - 9:10
named [1] - 33:7
narrowed [1] - 6:13
nature [2] - 13:4;
14:18
near [1] - 31:25
necessary [6] - 6:11;
7:16; 12:2; 15:2; 18:4;
38:25
necessity [1] - 4:7
need [14] - 7:11, 23;
13:19, 24; 14:1; 26:14;
35:2, 12, 18; 36:11;
38:4, 13
needed [1] - 35:4
nerve [1] - 10:1
Never [1] - 30:6
never [9] - 3:7; 4:17,

22; 10:2; 16:21; 21:24; **5**
22:4; 27:17; 30:17
NEW [1] - 1:1
new [2] - 39:11; 40:1
New [5] - 1:5, 14, 22;
9:13, 24
next [2] - 3:14; 39:13
nice [1] - 40:2
nobody [1] - 20:3
notation [1] - 36:4
notes [9] - 10:3;
17:18; 20:15; 23:9, 12;
30:12, 15; 32:8; 34:2
nothing [3] - 10:23;
22:13; 29:11
notice [1] - 3:6
notify [1] - 19:19
notifying [1] - 19:20

O

obligation [10] -
11:6; 14:20; 25:21, 24;
27:9, 25; 31:24; 33:20;
36:22
obligations [2] -
19:19; 34:19
obviate [2] - 7:11, 23
obviously [3] - 18:25;
31:12; 33:19
Obviously [1] - 38:9
occurred [2] - 11:9;
20:7
OF [3] - 1:1, 3, 8
Office [15] - 8:12;
10:4; 12:18; 13:10, 17;
14:8; 19:20; 20:23;
21:16, 19; 26:15, 19;
35:1, 9; 36:21
office [2] - 8:20;
26:21
Official [1] - 1:21
once [3] - 16:21; 30:6,
19
One [2] - 1:13; 15:18
one [10] - 3:18, 24;
4:16, 20; 9:12; 12:25;
13:17; 15:5; 17:12;
23:5
one's [1] - 19:17
open [1] - 16:2
opened [2] - 15:18;
29:13
opening [2] - 16:16
opposed [1] - 10:9

ORAL [1] - 1:8
oral [3] - 2:1; 19:23;
 38:22
order [1] - 5:20
ordinarily [2] - 32:12
otherwise [1] - 35:15
outcome [1] - 30:5
outrageous [1] - 10:14
outstanding [1] - 38:9
overall [1] - 9:1
own [3] - 7:21; 9:9;
 19:19

P

page [1] - 30:1
papers [8] - 7:10;
 16:23; 18:20; 22:19;
 34:18; 39:2, 8, 10
paragraph [1] - 30:2
part [3] - 6:15; 17:2;
 18:21
particular [1] - 32:16
passionate [1] - 10:24
past [3] - 3:16; 6:18;
 25:16
Paul [1] - 1:21
pause [1] - 38:1
pay [6] - 7:8; 8:13;
 16:22; 17:9; 34:11, 20
Peggy [22] - 7:8; 8:1;
 9:21; 10:5; 11:13;
 12:13, 23; 13:12;
 16:22; 17:8; 19:10, 15;
 20:4; 21:12, 15, 25;
 24:13; 27:2, 22; 31:22;
 32:21; 35:22
people [1] - 3:6
perfectly [1] - 38:6
performance [1] - 7:21
perhaps [1] - 7:23
period [1] - 9:14
perjured [1] - 9:16
perjury [19] - 11:8,
 12; 14:13; 20:7, 10;
 25:20; 26:24; 27:10;
 28:11; 29:2; 31:23;
 33:3, 11, 13, 18-19, 23
permitted [5] - 7:19;
 12:14; 15:7; 16:13;
 33:8
permitting [1] - 28:6
PERSICO [1] - 1:6
Persico [3] - 1:16;
 2:2, 10

Persico's [1] - 2:11
person [1] - 12:8
personally [1] - 8:10
Ph [1] - 1:22
phone [1] - 4:22
phrase [1] - 26:20
Pierrepoint [1] - 1:13
place [1] - 4:7
planned [1] - 39:12
Plaza [2] - 1:13, 22
plural [1] - 7:15
point [22] - 3:13;
 11:22; 16:17; 21:6;
 22:17; 24:2, 8; 25:15,
 17; 26:25; 28:22;
 30:19; 32:17, 20;
 33:25; 34:1; 35:3, 16;
 36:1, 13
Pontecorvo [15] -
 4:15; 6:13; 9:18; 10:6;
 11:20; 14:4, 12; 19:13;
 20:3; 21:13; 22:15;
 23:25; 24:5; 27:22;
 36:9
portion [1] - 32:3
position [5] - 12:3;
 13:8, 21; 19:11; 34:17
possibility [1] -
 11:11
possible [1] - 28:8
possibly [3] - 14:3,
 11; 26:23
posttrial [1] - 38:10
potential [1] - 28:25
precisely [2] - 14:25;
 28:19
prepared [6] - 6:18;
 7:24; 8:11; 18:5;
 19:21; 21:18
presence [1] - 37:17
present [2] - 5:23;
 38:7
Present) [1] - 1:17
presented [1] - 3:2
press [1] - 4:9
pretty [3] - 5:20;
 20:2; 36:22
primarily [2] - 4:5,
 14
primary [2] - 5:8; 8:18
probability [1] - 30:3
problem [1] - 4:17
proceedings [1] - 38:2
Proceedings [1] - 1:24

proceeds [5] - 9:8;
 10:2, 13; 15:19; 20:18
process [2] - 9:13;
 36:4
produce [2] - 3:5; 17:1
produced [3] - 1:25;
 29:12, 14
producing [2] - 4:17;
 35:11
proffer [15] - 16:11;
 23:4, 7, 9, 12, 14-16;
 25:4, 18; 30:16; 31:22;
 32:24; 33:1, 6
proof [1] - 10:21
prosecutors [2] -
 29:2; 33:22
prove [1] - 26:2
provide [4] - 9:19;
 20:11; 29:24; 34:12
provided [5] - 24:13;
 30:20, 24; 31:7; 35:15
provides [1] - 18:17
public [1] - 39:24
purpose [2] - 6:5; 7:18
purposes [1] - 7:22
put [7] - 18:20; 22:12;
 26:11; 31:2, 9; 34:4;
 39:6
putting [3] - 11:18;
 28:10, 16

Q

questions [3] - 5:12;
 12:15; 22:4
quickly [1] - 39:22
quite [1] - 39:2
quote [4] - 7:13;
 17:19; 31:8
quote-unquote [1] -
 31:8
quoted [1] - 34:5

R

racketeering [1] -
 15:19
raised [5] - 3:7; 4:21;
 6:19; 7:5; 28:14
raising [2] - 10:25;
 19:4
ranks [1] - 13:13
rapidly [1] - 39:23
rather [3] - 3:4; 17:9;
 36:24
read [3] - 30:12, 15;

32:3
readily [1] - 36:7
really [6] - 4:13-15;
 22:13; 32:10; 35:2
reason [2] - 21:20;
 24:11
reasoning [1] - 31:6
received [1] - 4:22
recently [1] - 37:12
recitation [1] - 22:6
recollection [3] -
 22:9; 23:13; 28:6
record [5] - 2:17; 5:9;
 6:5; 26:22
recorded [1] - 1:24
red [1] - 8:24
regarding [2] - 4:21;
 10:21
regards [2] - 9:17;
 19:11
regulations [2] -
 4:22; 5:7
rehashing [1] - 35:6
relate [1] - 4:10
relating [1] - 7:20
relative [1] - 5:21
relevance [3] - 16:18;
 24:10, 12
relevant [4] - 4:11;
 16:23; 24:18; 35:6
relocation [1] - 17:4
rely [1] - 22:19
remand [1] - 28:17
remanded [2] - 25:12;
 36:25
remember [3] - 3:24;
 4:3; 21:24
remembers [1] - 3:21
reply [1] - 39:18
report [1] - 19:21
Reporter [1] - 1:21
reports [1] - 20:15
require [2] - 8:13;
 37:16
required [6] - 7:8;
 17:1, 4; 34:10, 13
requiring [1] - 3:8
respect [3] - 12:7;
 15:16; 22:21
respond [3] - 12:14;
 24:19; 29:4
response [2] - 12:17;
 26:17

rest [1] - 11:18
result [2] - 11:6;
 33:14
resulted [1] - 30:4
reveal [2] - 14:21;
 16:4
revealing [1] - 14:24
reversal [1] - 33:23
review [1] - 19:11
rights [1] - 3:8
Rittweger [10] -
 17:14, 16; 28:22;
 29:10, 12, 25; 32:1;
 34:5; 35:23; 36:17
RITTWEGER [1] - 17:14
RMR [1] - 1:21
ROBERT [1] - 1:18
Robert [1] - 2:20
Rodriguez [7] - 24:21;
 28:16; 29:20; 36:18
ROSLYNN [1] - 1:12
rug [2] - 9:6; 11:1
Rule [6] - 5:21; 6:20;
 8:24; 22:18; 38:8, 22
RUSSO [12] - 1:18;
 2:20; 4:1; 5:17; 9:4;
 19:2; 26:16; 27:13;
 36:14; 37:7; 39:1, 21

S

safe [2] - 9:14, 24
sake [2] - 24:4; 33:12
Sarita [1] - 2:9
SARITA [1] - 1:16
Saturday [1] - 3:23
saw [2] - 9:25; 19:16
schedule [1] - 6:10
scream [1] - 5:25
search [1] - 36:3
Second [11] - 16:20;
17:18; 24:21; 25:6, 12;
30:7, 9, 19, 23; 31:1;
33:17
second [1] - 37:12
Secondly [1] - 16:5
see [6] - 2:8; 19:3,
21; 36:3; 38:6, 18
seem [1] - 12:19
seize [1] - 17:24
sense [1] - 20:9
sentence [2] - 7:13;
40:1
sentences [1] - 39:25

seriously [1] - 12:1
served [1] - 4:23
Service [1] - 17:5
service [1] - 4:24
session [13] - 16:11;
 23:4, 7, 13, 15-16;
 25:5, 18; 31:22; 32:24;
 33:1, 6
sessions [1] - 23:9
set [1] - 38:16
setting [1] - 12:1
several [1] - 3:1
SEYBERT [1] - 1:9
shocked [2] - 3:4; 9:4
show [2] - 27:21; 30:23
shred [1] - 10:20
sides [1] - 39:12
sight [1] - 22:16
signatory [2] - 30:13,
 17
simply [3] - 4:12;
 5:12; 34:19
Simply [1] - 23:18
sitting [1] - 25:23
situation [7] - 17:22;
 20:5; 21:5; 24:24;
 25:1; 27:20; 31:6
six [1] - 3:6
sneeze [1] - 13:10
sneezes [1] - 24:7
sole [1] - 30:13
someone [1] - 21:19
sometime [1] - 14:5
sorry [1] - 10:24
sort [1] - 18:2
specifically [2] -
 28:2; 33:6
spent [2] - 11:14;
 18:21
spite [1] - 34:8
spoken [2] - 5:15; 12:9
stacks [1] - 30:1
stand [6] - 9:19; 14:4;
 19:14; 23:2; 33:2
started [2] - 6:21;
 30:21
state [1] - 2:3
statement [2] - 16:16
statements [2] -
 19:25; 30:16
STATES [4] - 1:1, 3, 9,
 12
States [4] - 1:5; 21:1;

26:15; 33:7
status [1] - 5:23
statutory [1] - 39:24
stenography [1] - 1:24
still [4] - 6:20;
 20:23; 31:14, 18
stipulate [5] - 7:7,
 24; 8:11; 14:11; 21:18
story [3] - 14:19, 24;
 23:1
straightforward [1] -
 21:10
stretch's [1] - 28:7
stretched [1] - 10:6
stretches [2] - 19:17,
 24
struck [1] - 12:23
stumble [2] - 15:24;
 24:25
stumbled [1] - 31:8
submission [7] -
 37:23; 38:4, 15; 39:7,
 9, 18
submit [1] - 2:16
submitted [2] - 32:4,
 18
subornation [1] -
 27:10
suborning [1] - 29:3
subpoena [1] - 4:25
subpoenaed [3] - 3:1;
 4:20, 23
subpoenas [1] - 3:2
substance [4] - 25:10;
 29:23; 31:19; 35:21
sufficient [2] -
 14:23; 36:2
suggest [3] - 8:8;
 19:23; 21:2
suggestion [1] - 33:25
suitcase [1] - 19:16
Suite [1] - 1:22
summation [3] - 16:20;
 24:14; 31:13
summations [1] - 18:22
supervisor [5] -
 10:22; 13:11; 24:7;
 26:18, 20
supervisor's [1] -
 24:6
supervisors [1] -
 19:19
support [3] - 13:7;
 20:25; 33:24

7

suppressed [1] - 8:11
surprised [1] - 12:13
sweep [1] - 9:5
sweeping [1] - 10:25

T

table [1] - 25:23
tact [1] - 16:1
talks [1] - 34:4
tax [4] - 7:8; 8:13;
10:8, 15
taxes [4] - 16:22;
17:9; 34:11, 20
telephone [1] - 4:5
term [2] - 27:12
terms [2] - 4:17; 20:9
testified [4] - 9:7,
12; 21:12; 22:15
testify [7] - 7:19;
12:23; 16:6, 8; 17:5,
13; 23:2
testimony [13] - 7:16;
8:1; 13:4; 14:16;
17:17; 19:10, 23; 20:4;
29:15; 30:11; 32:7, 13;
35:19
THE [51] - 1:9; 2:1, 7,
12, 17, 23; 3:11, 24;
6:24; 8:2, 15; 12:4;
14:3, 9, 11; 15:3, 9,
13, 17; 16:14; 18:10;
21:23; 22:2, 20; 23:10;
26:7, 9; 27:12; 29:8;
32:25; 33:4, 12; 35:7,
25; 36:8, 11, 17, 20;
37:3, 16, 25; 38:3, 11,
18, 25; 39:2, 5, 7, 9,
16, 22
therefore [1] - 31:2
thinking [1] - 27:14
three [2] - 25:23;
33:22
tiptoes [1] - 9:23
today [2] - 28:1; 39:5
together [1] - 29:18
took [1] - 23:12
top [1] - 15:16
totally [1] - 21:5
Toughy [8] - 3:7, 20;
4:13, 22; 5:7; 6:18;
7:17
Transcript [1] - 1:25
TRANSCRIPT [1] - 1:8
trial [31] - 6:20, 23;

7:2, 9; 8:5; 9:8; 11:4; 13:3; 15:21; 17:11; 20:8, 10; 21:5; 23:6; 24:14; 26:24; 27:14, 16; 28:20; 29:12; 30:8, 21, 24; 31:4, 8; 32:6, 9, 18; 33:14; 35:10; 40:1 true [1] - 23:1 trustee [1] - 30:14 truth [5] - 9:21; 10:6; 26:1; 32:22 try [3] - 20:11; 36:7; 37:1 trying [10] - 7:17; 9:5; 10:10; 17:23; 20:5; 24:23; 25:16; 26:3; 32:20 turn [2] - 10:7; 36:23 turned [1] - 35:10 two [15] - 4:15; 6:13, 22; 8:21; 9:7; 12:25; 15:15; 23:4; 26:23; 36:24; 37:20, 22, 24; 38:6, 19 Two [2] - 38:3; 39:5 type [1] - 11:15	17; 14:8; 17:5; 19:20; 20:23; 21:15, 19; 26:19; 35:1, 9; 36:21 <hr/> V <hr/> vacation [3] - 37:7, 11; 39:14 vacations [1] - 39:12 vague [1] - 28:5 various [2] - 18:23; 38:9 violation [11] - 13:5; 17:19; 18:8, 10, 12-13; 20:8; 26:6, 10; 28:25 virtually [1] - 33:16 voice [4] - 4:8; 5:22; 6:15; 10:25 <hr/> W <hr/> waived [2] - 2:10, 13 walk [1] - 10:14 Walsh [22] - 4:15, 20, 23; 6:14; 7:4; 8:18; 11:19; 12:7, 9-10; 13:18; 14:1; 21:19, 22, 24; 23:14, 19; 24:5; 25:18; 33:7; 36:6 wants [6] - 13:18, 22; 21:16; 34:17; 38:15 Washington [1] - 3:19 waste [1] - 36:23 week [5] - 12:9; 29:12; 32:6; 37:12 weeks [6] - 37:23; 38:3, 6, 19; 39:5 Westlaw [1] - 30:1 whatsoever [5] - 6:5; 9:15; 17:19; 20:24; 22:14 whole [2] - 10:9; 11:2 William [1] - 15:19 willing [2] - 7:7; 16:8 withheld [2] - 8:10; 28:18 withholding [1] - 17:25 witness [21] - 11:5; 17:1, 3; 18:18; 20:11; 24:17, 24; 25:2-4, 8-9, 25; 28:6; 29:16; 31:23; 32:7, 14; 33:18; 34:3; 35:5 witness's [3] - 6:9; 13:4; 34:8 witnesses [23] - 3:1,	18; 4:7, 14, 16, 18; 5:24; 6:13; 9:7; 11:3, 8; 12:3; 14:16; 16:1; 17:1, 13; 18:3; 26:23; 29:2; 35:13, 19; 36:1; 38:21 witnesses' [2] - 7:15 woman [1] - 23:18 worst [1] - 20:5 writing [1] - 2:14 wrote [2] - 10:2; 16:23 <hr/> Y <hr/> year [2] - 8:20 years [2] - 8:21; 36:25 yell [1] - 5:25 yesterday [1] - 7:12 YORK [1] - 1:1 York [5] - 1:5, 14, 22; 9:13, 24
<hr/> U <hr/> unavailable [1] - 5:2 under [8] - 9:6; 11:1; 14:25; 18:7; 22:18; 30:2; 34:13, 19 understandably [1] - 12:16 unfortunately [1] - 11:22 UNITED [4] - 1:1, 3, 9, 12 United [4] - 1:5; 21:1; 26:15; 33:7 unless [3] - 14:12; 16:11; 25:11 unquestionably [1] - 13:5 unquote [1] - 31:8 untimely [1] - 17:16 untruthfully [1] - 22:15 up [12] - 4:8; 11:5, 24; 13:1; 18:2; 20:4, 21; 23:2; 26:25; 27:24; 29:1 US [17] - 2:1; 8:12; 10:4, 22; 12:18; 13:10,		